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Nos. 80-1937, 80-1938, 80-1939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION,
NORTH CAROLINA UTILITIES COMMISSION,
NORTH CAROLINA NATURAL GAS CORPORATION, *et al.*,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
BROOKLYN UNION GAS COMPANY, *et al.*,
LONG ISLAND LIGHTING COMPANY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY FOR PETITIONER NORTH CAROLINA UTILITIES COMMISSION

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The petitions for a writ of certiorari filed by the Federal Energy Regulatory Commission, the North Carolina Utilities Commission, and the North Carolina companies challenge the restrictions which the decision below would place on the FERC in carrying out its statutory mandate, under Sections 4(a) and 4(b) of the Natural Gas Act, to eliminate unduly discriminatory or preferential rates for natural gas service. The briefs in opposition filed by Brooklyn Union Gas, *et al.*, Long Is-

land Lighting, and the New York Commission—i.e., the parties which the FERC found had enjoyed unduly preferential rates at the expense of petitioners in Nos. 80-1938 and 80-1939—do not deny that the Natural Gas Act expressly prohibits unduly discriminatory or preferential rates, and that the court of appeals' decision will seriously complicate FERC's task in eliminating such rates. Rather, they rest their opposition to the grant of certiorari on what appears to be a major recasting of the decision below and a misreading of the governing precedents.

1. The basic legal difficulty with the court of appeals' decision is that, without warrant in either the language or logic of the statute itself, it seeks to engraft a complicated exception on the Natural Gas Act's simple requirement that "*the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company,*" Natural Gas Act, Section 4(e), 15 U.S.C. § 717c(e). The briefs in opposition seek to justify the court's ruling with a variety of alternative arguments. New York is clearly in error when it states that the language of the statute refers to "the *increase*" (NYPSC Br. 9), when in fact it refers to "the *increased rate*". Similarly, New York's contention (NYPSC Br. 8) that a pipeline's allocation of its cost of service to zones or classes of service is not "directly nor indirectly determinative of the rate increase it seeks" is incorrect; as Chief Judge Tuttle noted twenty years ago in *Tennessee Gas Transmission Co.* v. *F.P.C.*, 293 F.2d 761 at 769 (5th Cir. 1961) (dissenting opinion, emphasis supplied):[1]

> "The burden rests on the applicant to justify each rate increase. This includes the burden to establish the correctness of the *allocation of costs* of service as to *each schedule* filed."

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[1] The result urged in Judge Tuttle's dissent was ultimately sustained on certiorari in this Court, *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

The opposition briefs rely heavily on *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (NYPSC Br. 8, 13; Brooklyn Union Br. 7, 8, 9), and *American Louisiana Pipe Line Co.* v. *F.P.C.*, 344 F.2d 525 (D.C. Cir. 1965) (NYPSC Br. 13). Neither case, however, involved cost allocation or rate discrimination problems: *Mobile* involved whether the pipeline had, by contract, precluded itself from filing a rate change under Section 4, and *American Louisiana* was remanded for further proceedings essentially because the pipeline had not been given advance notice of the issue to be decided.[2]

2. Brooklyn Union's use (Br. 11) of a quotation from *Interstate Power Co* v. *F.P.C.*, 236 F.2d 372 at 387 (8th Cir. 1956), cert. denied, 352 U.S. 967 (1957), merits closer analysis, for the holding in that case stands for almost the exact opposite of Brooklyn's contentions here. There, as here, the pipeline had filed for increased rates using its prior allocations (there, a single uniform rate, with no zoning); the customers closer to the source of supply urged that the filed rates were discriminatory to them and preferential to the end-of-the-line customers; at the hearing, the closer customers and the Commission Staff both presented evidence allocating costs (and designing transportation rates) based on distance; the hearing examiner found in favor of the prior "historical" practice; and the Commission found that rates should be fixed on a distance (Mcf-mile) basis. At this point, the paths of the prior and the instant case diverge, for, on appeal by the end-of-the-line customers, the Eighth Circuit affirmed the FPC's 1955 adoption of the Mcf-mile

[2] There can be no question here that the discriminatory nature of using the 1962 differentials for 1976 costs was raised well in advance of hearings. Indeed, a settlement aimed at eliminating the discrimination had been filed with the Commission, and the discrimination issue was set for hearing, rather than resolved by settlement, only because of the opposition to settlement of two of the parties now opposing certiorari.

method of allocation for Northern Natural Gas Company, whereas here, the D.C. Circuit reversed the FERC's 1979 adoption of the Mcf-mile method of allocation for Transcontinental Gas Pipe Line Corporation.

In the 1956 *Northern* appeal, the end-of-the-line customers argued (similarly to Brooklyn Union-NYPSC here) that the Commission and the Eighth Circuit were precluded from deviating from the prior historical "method" because that "method" had been used in fixing Northern's rates in a 1949 Commission opinion and had been affirmed on appeal.[3] The court stated (236 F.2d at 387):

> "Petitioners' contention is to the effect that the Commission was precluded from fixing zones and differential rates for Northern.
>
> "We do not so conclude. It appears that this case presents the first instance in which the Commission has made what it has deemed to be a sufficient study of the facts to enable it to make definite and positive finding[s] that Northern's uniform rates are in fact unduly discriminatory. . . . We do not find sufficient cause to upset that ruling of the Commission."[4]

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[3] The prior case was *Trunkline Gas Co.*, 8 FPC 250 (1949), aff'd sub nom. *State Corporation Commission of Kansas* v. *F.P.C.*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922.

[4] In an ironic sidelight in the instant case, the court below completely misread the Commission's 1955 statement in *Northern*, 14 FPC at 19 n. 8—in which the Commission held that Section 4(b)'s ban on discriminatory rates was applicable in passing on increased rates under Section 4(e)—as a "recognition" by the Commission that its powers derived from Section 5, not Section 4 (FERC Pet. 14a). Actually, the Commission was merely noting that Section 4(e) explicitly gave the Commission in a Section 4 proceeding all the powers it would have under Section 5 as well as those available only under Section 4.

3. If, as each of the opposition briefs suggests (NYPSC Br. 7, 17; Brooklyn Union Br. 16-17; Long Island Lighting Br. 7), this case turns on substantial evidence and reasoned decision-making, it should be noted (a) that the evidence before the Commission here and the evidence in *Northern Natural* were virtually identical, and (b) that the Commission's rationale here was not only unusually detailed (it is set out at FERC Pet. 37a-50a), but it specifically relied on and quoted from the 1955 *Northern* opinion (*id.* at 39a-40a, 49a-50a). While the standard of review used by the court below is not entirely clear, its reversal of the Commission's result appears to rest not on a lack of substantial evidence but rather on a differing interpretation of the evidence from that provided by the agency. But this Court has, in a closely analogous situation, negatived such a construction of the substantial evidence rule, holding that substantial evidence

> "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 at 620 (1966).

WHEREFORE, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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